



INTERIOR BOARD OF INDIAN APPEALS

Estate of Florence Whiteman

39 IBIA 180 (10/28/2003)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF FLORENCE WHITEMAN : Order Docketing Appeal and Affirming
: Decision
:
: Docket No. IBIA 03-71
:
: October 28, 2003

Appellant Lorraine Waters sought review of an order denying rehearing entered in the estate of Florence Whiteman by Administrative Law Judge Robert G. Holt on January 31, 2003. RM-207-0006. For the reasons discussed below, the Board of Indian Appeals (Board) docketed this appeal and summarily affirms Judge Holt's order.

Judge Holt held two hearings in the estate on July 18 and October 11, 2002. At the hearings, a purported will prepared by the Bureau of Indian Affairs (BIA) for Florence Whiteman (Decedent), and dated December 14, 1994, was admitted into evidence. A codicil prepared by BIA on February 8, 2000, was also introduced.

Appellant, Decedent's daughter, was not named in Decedent's will or codicil. Appellant and her brother, Joseph Waters, Jr., challenged the validity of the will and codicil at the hearings. On October 28, 2002, the Judge issued a decision approving the will and codicil.

On December 27, 2002, Appellant filed a petition for rehearing. She argued that her sister and other family members had exercised undue influence over Decedent, and that Decedent had intended to change her will before she died. Appellant contended that Decedent called BIA to do so while she was in the hospital, but BIA did not follow Decedent's wishes before she died.

On January 31, 2003, Judge Holt denied rehearing, holding that Appellant failed to show any actual influence was exerted upon Decedent; Decedent's intent alone to change the will could not alter or revoke the will; and Decedent could have revoked her will in the hospital without the assistance of BIA.

On March 31, 2003, the Board received Appellant's appeal of the January 31, 2003, order. After reviewing Judge Holt's decision, the Board ordered Appellant to show why she

believed the Judge's decision was wrong as the decision appeared to conform with Board precedent concerning undue influence and the decedent's intent to change a will. See, e.g., Estate of Ella Sarah Case Barnes, 17 IBIA 72 (1989); and Estate of Fannie Newrobe Choate, 7 IBIA 171 (1979), aff'd, Sherman v. Andrus, No. CV-79-73-GF (D. Mont. 1981).

In another filing, Appellant contended that the Judge erred by applying the State law of Montana instead of the probate code enacted in 1987 by the Northern Cheyenne Tribe of Indians. Appellant also requested the Board to transfer her appeal to Tribal Court. In response to her argument, the Board ordered Appellant to show how the Judge erred in his refusal to apply the Tribal probate code and why the Tribal Court would have jurisdiction over trust assets in light of the Board's precedents. See, e.g., Estate of Mary Red Cherries, 38 IBIA 103 (2002); Estate of Kelly (Buck) Freeman, 38 IBIA 12 (2002); and Estate of Seymour Senator, 22 IBIA 290, recon. denied, 23 IBIA 5 (1992).

Appellant admits that it is questionable whether the Tribal probate code meets the requirements of section 2205 of the Indian Land Consolidation Act Amendments of 2000 (ILCA), 25 U.S.C. §§ 2201, et seq., 1/ as a BIA representative told the Northern Cheyenne Land Committee on April 24, 2003, that BIA had not approved the Tribal probate law. However, Appellant argues that the Judge erroneously applied Montana law instead of the Tribal probate code in violation of ILCA and Babbitt v. Youpee (Youpee), 519 U.S. 234 (1997). The Board rejects her argument for several reasons.

First, Judge Holt did not apply Montana law to determine whether to approve Decedent's will and codicil. Rather, he applied Federal regulations to find that the will should be approved. 43 C.F.R. § 4.240(a)(1) requires the determination of the heirs at law even when there is a will. Judge Holt referenced the Montana law of intestate succession to determine Decedent's heirs at law. See Barnes, 17 IBIA at 74-75. Appellant confuses the determination of who would have taken in the absence of a will with what actually happened in the case. In approving the will, the Judge did not apply Montana law.

Second, Judge Holt could not apply the unapproved Tribal probate code because to do so would have violated ILCA. See 25 U.S.C. § 2205. Furthermore, even if the Tribal probate code were approved, only that portion dealing with wills could be applied, not the part concerning intestate succession that Appellant urges should be applicable.

1/ Section 2205 of ILCA provides in pertinent part that,

“(b) Secretarial approval

“(1) In general

“Any tribal probate code enacted [under this act], and any amendment to such a tribal probate code, shall be subject to the approval of the Secretary.”

Third, in Youpee, the United States Supreme Court found the escheat provision in ILCA unconstitutional. There being no escheat ordered in this appeal, Youpee is not relevant. Red Cherries, 38 IBIA at 105, n. 1.

Appellant broadly states that Decedent was susceptible to undue influence by Appellant's sister and other family members. Appellant focuses on the time when Decedent was hospitalized shortly before her death in 2001. She argues that the testimony of the will scrivener and witnesses "is limited and restricted to that specific period of time when the Deced[e]nt was well and not being under the care of the hospital staff." Appellant's Dec. 27, 2002, Petition for Rehearing at 3.

Appellant erroneously relies on Decedent's state of mind in her final days at the hospital. The testimony of the witnesses was precisely on point. The relevant time periods to challenge Decedent's testamentary capacity were 1994 and 2000, when Decedent executed the will and codicil. See Estate of Jeanette Little Light Adams, 39 IBIA 32 (2003). Her allegations of undue influence are vague, speculative, and unsupported by relevant evidence. 2/ As such, the Board finds that she failed to show how controlling precedents are not applicable here.

Appellant next argues that the failure to prepare a transcript in this case violates her due process rights and other rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1302, et seq. She states that she needs the transcript to show that the testimony of a BIA employee supports her contention that Decedent wanted to change her will.

Whether or not Decedent intended to change her will does not affect the legal conclusion that Decedent's will could not be changed or revoked based solely on intent. Barnes, 17 IBIA at 76, and cases cited there. Appellant has made no relevant argument challenging the testimony taken at the hearings. Thus, the Board finds that any due process rights and any rights that might arise in a Departmental probate proceeding from the Indian Civil Rights Act were not violated by failing to prepare transcripts and make them available to Appellant.

Last, Appellant states that a proceeding has been filed in the Northern Cheyenne Tribal Court, and that "under the Tribe's Probate Law, [her] appeal to the Board may, in fact, be preserved under the Tribe's jurisdiction." Appellant's Aug. 25, 2003, Response at 3.

2/ On appeal, Appellant includes two new affidavits executed by Decedent's sister and grandson that discuss Decedent's final days. The Board does not normally accept new evidence or new arguments on appeal. Adams, 39 IBIA at 40, and cases cited there. Even if the Board were to go against this general rule, the affidavits are not relevant to Decedent's mental capacity in 1994 and 2000.

The Board presumes that Appellant is arguing that her arguments may be heard by the Tribal Court. Appellant is incorrect.

Congress has vested the Secretary of the Interior with authority to approve Indian wills which devise trust or restricted property. 25 U.S.C. § 373 (1988). Pursuant to that authority, the Secretary has promulgated regulations, including 25 CFR 4.260(a), [regarding the making of a will] * * *. The Federal statute and regulation control here. See, e.g., Estate of Baz Nip Pah, 22 IBIA 72, 74 (1992).

Senator, 22 IBIA at 291. Thus, the Department of the Interior has exclusive jurisdiction to probate trust or restricted Indian estates, and probate actions filed in Tribal Court apply only to non-trust assets. Appellant's arguments here cannot be heard by the Tribal Court in regard to trust property.

It is clear that there is no set of circumstances under which Appellant can prevail in this appeal. Accordingly, the Board finds that briefing and preparing the transcript of the hearings are not necessary and that a decision may be issued at this time. Estate of Calvin Leroy Leighton, 36 IBIA 215 (2001); and Estate of Frances Alfred Graham, 34 IBIA 276 (2000), and cases cited there.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed, and Judge Holt's January 31, 2003, order denying rehearing is summarily affirmed.

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge